IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 17905 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHAVNAGAR SAHAKARI HAT MADHYASTHA BHANDAR LTD.

Versus

BACHUBHAI M RAJPURA C/O. MAZDOOR PANCHAYAT

Appearance:

1. Special Civil Application No. 17905 of 2003

MR HS MUNSHAW for Petitioner No. 1

MR YV SHAH for Respondent No. 1

MR MENGDEY, Ld. AGP for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 19/02/2004

ORAL JUDGEMENT

1. Rule. Mr.Y.V.Shah, learned Counsel waives

service of notice of rule for respondent No.1 and Mr.Mengdey, learned AGP waives service of notice of rule on behalf of respondent No.2. With the consent of the parties, the matter is taken up for final hearing today.

2. The only question which arises for the consideration of the Court is that in the award of reinstatement, whether the workman would be entitled for the wages beyond the age of superannuation, if he is not reinstated in service.

3. The short facts of the case appear to be that the services of the respondent workman came to be terminated, which gave raise to the dispute under Industrial Disputes Act. The said dispute was referred to the Labour Court, Rajkot for adjudication and ultimately the Labour Court, Rajkot passed the award dated 14-8-19981 in Reference (LCR) No.252/1979, whereby the action of termination of services was held to be illegal and the petitioner was directed to reinstate respondent No.1 with full backwages from 29-12-1978 till the reinstatement with the cost of Rs.200/=. It appears that against the said award Special Civil Application No.843/1982 was preferred by Bhavnagar Dairy, Bhavnagar and Special Civil Application No.2393/1982 was preferred by the petitioner, both for challenging the legality and validity of the award. In the said SCA as per the order dated 13-12-1992 passed by this Court reinstatement was confirmed, however, on the question of backwages, the matter was remanded to the Labour Court. The said matter, after remanded before the Labour Court, was renumbered as Reference (LCB) No.150/1997. The Labour Court, after remand, directed for payment of wages of Rs.23,229/= as per the award dated 31-3-1999. Further it appears that thereafter respondent No.1 preferred Recovery Applications No.123/1999 and No.173/2000 for recovery of the amount since there was no reinstatement and the award passed by the Labour Court was not complied with. The Labour Court ultimately passed a common order dated 20-2-2003 in both the aforesaid Recovery Applications and directed for recovery of the amount of Rs.2,24,776/= with the interest at the rate of 12% and the cost of Rs.1,000/=. The said order dated 20-2-2003 passed by the Labour Court is under challenge in this petition. The petitioner herein also preferred Misc. Civil Application No.11/2003 for recovery and modification of the order dated 20-2-2003 passed in Recovery Applications No.123/1999 and No.173/2000, but the Labour Court ultimately dismissed the said application as per the order dated 17-9-2003 and the said order of the Labour Court dated 17-9-2003 is also challenged by the petitioner in this petition.

4 Mr.Munshaw, learned Counsel appearing for the petitioner submitted, inter alia, that as per Rule 15 of Service Regulations of the petitioner, the employee is entitled to continue in service upto the age of 58 years and he further submitted that when the deposition of respondent No.1 was recorded before the Labour Court on 20-7-1981 in Reference Case No.252/1979 below Ex.13, respondent No.1 has disclosed his age as 51 years and, therefore, he submitted that respondent No.1 would reach the age of superannuation in the year 1988 and, therefore, the Labour Court could not have passed the order for recovery of the wages beyond the period of 1988 i.e. the year in which respondent No.1 would have reached the age of superannuation. Therefore, he submitted that the order passed by the Labour Court in the recovery applications for directing for payment of wages upto the year 2000 deserves to be interfered with.

5. On behalf of respondent No.1, Mr.Shah, learned Counsel submitted, inter alia, that no such contention on the aspects of reaching the age of superannuation was raised by the petitioner before the Labour Court in the Recovery Application, even prior that to, and, therefore, the petitioner cannot be allowed to raise such contentions. Mr.Shah also submitted that even on the question of reaching the age of superannuation, no such contention was raised throughout by the petitioner before the Labour Court. He submitted that in absence of any specific regulations providing for age of retirement, an employee is entitled to continue in services throughout his life and the order of reinstatement, if not effected, the liability to pay the wages would continue and for such purpose, he relied upon the decision of Madras High Court in the case of "K.S.Ramaratnam v. Labour Court and Another", reported in 2002 LLR, 761 and, therefore, he submitted that the order passed by the Labour Court is legal and valid and it does not call for interference.

6. Therefore, the first aspect which will be required to be considered is whether the employee would be entitled to reinstatement at any age and in case he is not reinstated, would he be entitled to the wages throughout his life or not. There is no dispute on the point that respondent No.1 is seeking reinstatement in the petitioner Society. Mr.Munshaw, during the course of hearing has submitted the copy of the Service Regulations and Clause 15 of the said Regulations, inter alia, provides for retirement and it provides that the age of retirement of the employees shall be 58 years and upon reaching the said age the employee would be required to

be retired. However, if the managing committee finds that it is necessary to continue him in service, extension can be given. Therefore, it is apparent that for normal service, the age of retirement provided is of 58 years. Mr.Shah for respondent No.1 had made an attempt to submit that such Service Regulations would not apply to the case of respondent No.1 since as per his submission, respondent No.1 was in service prior that and Service Regulations are of 1989. There is no documentary evidence produced by respondent No.1 to support the said contentions that Service Regulations are not applicable to respondent No.1. Even if the contention is examined, then also once Service Regulations are framed or modified, it would apply to all its employees, irrespective of the fact that whether they joined prior to the framing of such Regulations or not. Such will be the situation in normal circumstances and if the existing employees who are in service prior to framing of Service Regulations feel aggrieved by any Clause of the Service Regulations, it would be for the employees concerned to challenge the said part of the Service Regulations and in absence of any challenge, it is deemed that such regulations would apply to all employees of the employer. Therefore, when Service Regulations are applicable and if they provide the age of retirement of 58 years, respondent No.1 cannot validly contend that he would be entitled to be in service until he is physically fit to work during his life time and, therefore, the decision of Madras High Court upon which the reliance is place by Mr.Shah would also not be of any help to respondent No.1. Even otherwise also, I am unable to agree with the view taken by Madras High Court in the decision of "K.S.Ramaratnam" (supra) that in absence of any Service Regulations, the employee would be entitled to continue in service throughout his life, provided he is physically fit. As such, had it been a case of private employment, the matter could have been viewed differently, but in the present case, as it appears from the Service Regulations, which are produced on record, the same is governed by Industrial Employment Standing Orders Act and the Model Standing Order also provides for 60 years as the age of retirement with the provisions to fix the age of retirement by agreement with the employer and the employees' union and, therefore, when the Industrial Employment Standing Orders Act is applicable to the functioning of the petitioner, it cannot be, in any circumstances, beyond the age of 60 years. In the present case, if there is no express age limit provided, it would have been 60 years as the age of retirement, but as per Clause 15 since the age of retirement is fixed as 58 years, it deserves to be concluded that the age of

retirement of the employees of the petitioner would be 58 years and not 60 years.

7. The second aspect which is required to be considered is the date on which respondent No.1 would reach the age of superannuation or the age of retirement. The statement made on oath by respondent No.1 in his deposition before the Labour Court in Reference Case No.252/1979 shows for declaration of age as 51 years on 20-7-1981 and, therefore, it can reasonably be presumed that the birth-year of respondent No.1 would be 1930 since 51 years age was declared in the year 1981. Mr.Shah voiced the grievance that no such dispute was raised on the question of birth-date by the petitioner before the Lower Court and, therefore, he had submitted that the age of 51 years cannot be presumed in the year 1981. Firstly, the deposition of the workman concerned respondent No.1 herein is before the Labour Court in the proceedings of the very award in which reinstatement was ordered and the said declaration is on oath and, therefore, respondent No.1 cannot be allowed to back-out from the said statement. Still, however, with a view to give opportunity to respondent No.1 on the last date on 4-2-2004 this Court had passed the order calling upon respondent No.1 to disclose before the Court by way of birth-certificate or otherwise of his birth-date and today when the matter is taken up for hearing, Mr.Shah has shown his inability to produce any authenticated record showing the birth-date of respondent No.1. Therefore, under these circumstances it would be reasonable to conclude that the birth-year of respondent No.1 would be 1930 since he disclosed his age as 51 years on oath in the year 1981 and, therefore, accordingly respondent No.1 would reach the age of superannuation in the year 1988, taking the birth-year as of 1930.

8. I am not impressed by the contention raised by Mr.Shah that the Labour Court has not committed any error which is apparent on the face of record. The basis of the said contention is that on behalf of the petitioner no such contention was raised and, therefore, the petitioner cannot be allowed to raise such contention for assailing the order of the Labour Court. As such, in a Recovery Application, it would be for the applicant to establish the right to receive the wages in accordance with law. In the present case, it would be for the workman concerned to establish that he was required to be paid wages and since the wages are not paid the Recovery Application is preferred. While asserting the right to receive wages, it will be for the applicant to establish that such right to receive the wages continued in law.

If there is cessation of right to receive wages, the Recovery Application for recovery of such wages cannot be pursued further, nor can the Labour Court pass the order for recovery of such wages which is not permitted under the law. As observed earlier, respondent No.1, who was applicant before the Labour Court, at the most could have pressed for recovery of the wages upto the year 1988 and even if the most liberal construction is given, the same would be upto December, 1988 and not beyond the same. If respondent No.1 who was applicant before the Labour Court has not sufficiently disclosed the continuation of lawful right to receive wages after December, 1988, under any circumstances, the Labour Court could not have passed the order for recovery of the amount of so-called wages as claimed after December, 1988. Therefore, even in absence of such contention, it was for the Labour Court to examine the same. When it has been subsequently demonstrated before this Court that respondent No.1 would not be entitled to wages beyond the age of superannuation, I am not inclined to reject the contention of the petitioner, merely because it was not raised or contended before the Labour Court. I am inclined to allow the petitioner to raise such contention, because I find that respondent No.1 did not sufficiently discharge the burden of asserting the right to receive wages beyond the period of December, 1988 i.e. after reaching the age of superannuation and also because the opportunity is given to respondent No.1 to meet with such contentions before this Court and respondent No.1 has not been able to show any material contrary to the material of declaration on oath by Respondent No.1 himself which is produced by the petitioner before this Court in the present proceedings. Therefore, considering the peculiar facts and circumstances of the case as referred to hereinabove, I am of the view that the normal principles of not allowing the parties to raise the contention before this Court for the first time when it was not raised before the lower Court should not operate as bar and with a view to render complete and full justice, the departure from such normal principles should be made considering the aforesaid extraordinary circumstances.

9. However, even if the contention of the petitioner is accepted that respondent No.1 would not be entitled to wages beyond December 1988, respondent No.1, in any case, would be entitled to a reasonable interest on the said wages at the rate of 6% per annum from the date on which it became due until its payment by the petitioner to respondent No.1, because respondent No.1 is deprived of such amount and the petitioner has enjoyed such amount

for the said period.

10. In view of the aforesaid discussion the order dated 20-2-2003 passed by the Labour Court, Bhavnagar in Recovery Application No.123/1999 and Recovery Application No.173/2000 shall stand quashed and set aside so far it relates to ordering the payment of wages beyond the period of December, 1988 and awarding interest at rate of 12% and shall stand confirmed for ordering the payment of wages upto December, 1988 with interest at the rate of 6% per annum till the actual payment to respondent No.1.

11. The petitioner shall accordingly calculate the wages upto December, 1988 as per the details given from pages 32 to 36 and the interest shall be added from December 1988 till February 2004 at the rate of 6% per annum. Since Mr.Munshaw for the petitioner has submitted that the total amount, even if it is calculated upto December, 1988 with interest at the rate of 6% p.a. would exceed Rs.85,000/=, respondent No.1 shall be at liberty to withdraw the said amount which is deposited by the petitioner pursuant to the order passed by this Court on 23-12-2003 and the balance amount shall be paid by the petitioner to respondent No.1 within a period of two months from today.

12. The petition is allowed to the aforesaid extent. Rule is partly made absolute. Considering the facts and circumstances of the case, the petitioner shall additionally pay the cost of Rs.2,000/= to respondent No.1.

13. It will be open to the petitioner to request the office to make the payment from the amount deposited with this Court by Demand Draft drawn in the name of respondent No.1 by "Account Payee" cheque after deduction of the commission in accordance with law.

20-2-2004 (Jayant Patel, J.)

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